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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92062865
Party	Plaintiff TRAXXAS LP
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

TRAXXAS LP

Petitioner

v.

LIGHTUPTOYS.COM LLC

Registrant

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Cancellation No.: 92062865

Registration No.: 4860604

**PETITIONER’S BRIEF IN RESPONSE TO REGISTRANT’S MOTION FOR AN
EXTENSION OF TIME TO ANSWER**

and

**PETITIONER’S MOTION FOR DEFAULT JUDGMENT FOR FAILURE TO
ANSWER**

Registrant LightUpToys.com LLC (“Registrant”) has filed a Motion for an Extension of Time to Answer (“Registrant’s Motion”) in this matter. Petitioner Traxxas LP (“Petitioner”) hereby requests that Registrant’s Motion be denied for both procedural and substantive deficiencies of Registrant’s Motion. Procedurally, Petitioner asserts that Registrant’s Motion should be denied since it was not properly served in accordance with applicable rules. Substantively, Petitioner asserts that Registrant’s Motion should be denied since it fails to meet the standards outlined in Section 509.01(a) of the Trademark Trial and Appeal Board Manual of Procedure (TBMP).

Furthermore, since Registrant has not timely filed an Answer to Petitioner’s Petition for Cancellation, Petitioner requests that default judgment be entered in favor of Petitioner in this matter, as discussed further in Section II of this paper.

I. REGISTRANT'S MOTION FOR AN EXTENSION OF TIME TO ANSWER SHOULD BE DENIED

Petitioner requests that Registrant's Motion be denied for being both procedurally and substantively deficient, as discussed herein. The filing deadline for Registrant's Answer should remain February 5, 2016, as originally set.

A. Registrant's Motion is procedurally deficient since service of Registrant's Motion was ineffective.

The Certificate of Service filed with Registrant's Motion asserts that service of Registrant's Motion (mistakenly identified in the document as "Defendant's Answer to Petition to Cancel") was made on February 5, 2016, via email. No other copy of Registrant's Motion has been delivered to Petitioner.

Service via email, or electronic transmission, is a permissible means for effecting service only upon mutual agreement of the parties. 37 CFR § 2.119(b)(6). In this proceeding, the parties have not mutually agreed to service via email. Registrant's attempt at service of the Registrant's Motion to Petitioner was, therefore, ineffective. Since Registrant's Motion was not properly served, it may not be considered by the Patent and Trademark Office and, therefore, should be denied. 37 CFR § 2.119(a).

B. Registrant's Motion should be denied since it fails to meet the standards outlined in TBMP § 509.01(a).

Registrant's Motion fails to provide sufficient details to satisfy the requirements of a motion to extend described in TBMP § 509.01(a). Specifically, Registrant's Motion is insufficient and should be denied since it fails to: (1) state particular facts constituting good cause for granting an extension of time; (2) demonstrate that the requested extension

of time was not necessitated by a lack of diligence or unreasonable delay by the Registrant; and (3) provide a legally sufficient reason necessitating an extension of time.

Registrant only alleges the following to justify the grant of an extension of time:

Respondent's request is based on changes in Respondent's marketing and distribution initiatives for goods bearing the above-identified registration that may affect Respondent's responses in its Answer to Petition to Cancel.

This statement is a mere conclusory allegation with no factual detail. It provides no particular facts constituting good cause. Further, it provides no facts demonstrating that the requested extension of time was not necessitated by a lack of diligence or unreasonable delay. The statement is legally insufficient for an extension of time.

i. Registrant's Motion does not state particular facts constituting good cause for granting an extension of time.

A motion to extend must set forth with particularity the facts said to constitute good cause for the requested extension; mere conclusory allegations lacking in factual detail are not sufficient. TBMP § 509.01(a). The party moving for an extension bears the burden of proof, and must "state with particularity the grounds therefor, including detailed facts constituting good cause." *SFW Licensing Corp. v. Di Pardo Packing Ltd.*, 60 USPQ2d (BNA) 1372, 1375 (TTAB March 9, 2001) (quoting *Luemme, Inc. v. D.B. Plus, Inc.*, 53 USPQ2d (BNA) 1758, 1760 (TTAB April 12, 1999)). The Trademark Trial and Appeals Board ("the Board") has repeatedly denied Motions to Extend which are based on mere conclusory statements alone.

In one case, the Board denied a Motion to Extend based on the assertion that counsel had not received timely instructions from his clients regarding how to proceed. *SFW Licensing*, 60 USPQ2d at 1375. The Board noted in denying the Motion to Extend that the basis provided

included no facts regarding attempts by counsel to contact his clients and failed to show any exercise of diligence. *Id.*

In another case, the Board denied a Motion to Extend which was based on the petitioner's assertion that extensive travel made it difficult for petitioner to participate with its counsel, necessitating the requested extension. *Luemme*, 53 USPQ2d at 1761. The Motion was denied by the Board since it failed to provide facts concerning the nature and dates of travel and facts demonstrating efforts counsel made to contact petitioner as well as what difficulties, if any, counsel experienced trying to contact petitioner. *Id.*

As noted above, Registrant's Motion merely asserts "changes in [Registrant's] marketing and distribution initiatives" as the sole basis necessitating grant of an extension of time for Registrant to answer. Notably, no information is provided about the cited changes to the marketing and distribution initiatives. Nor is any information provided regarding the timing of these changes or what effect they may have on Registrant's responses to the allegations made in Petitioner's Petition for Cancellation. The facts asserted in Registrant's Motion, therefore, are insufficient for meeting the burden of proof of a moving party requesting an extension as they do not state with particularity detailed facts constituting good cause. For at least this reason Registrant's Motion should be denied.

ii. Registrant's Motion fails to demonstrate that the requested extension of time was not necessitated by a lack of diligence or unreasonable delay by the Registrant.

A motion to extend must demonstrate that the requested extension of time is not necessitated by the moving party's own lack of diligence or unreasonable delay. TBMP § 509.01(a). The Board has stated that the moving party has the burden of persuading the Board that it was diligent in meeting its responsibilities and should therefore be awarded additional time

in order for an extension to be granted. *NFL v. DNH Mgmt., LLC*, 85 USPQ2d (BNA) 1852, 1854 (TTAB Jan. 29, 2008).

In *NFL*, the Board denied an extension of the discovery period based upon a finding that the movant had not made the minimum showing necessary to establish good cause to support grant of an extension. *Id.* The Board noted that the movant delayed in initiating action until near the end of the original discovery period, serving its initial discovery requests two days prior to the end of the period. *Id.* The Board reasoned that since the movant did not provide facts demonstrating some exigent circumstances preventing timely action, the need for an extension was the product of the movant's unwarranted delay and, therefore, denied the extension request. *Id.* at 1855. Similarly, in both *SLW Licensing* and *Luemme*, the Board considered delay by the movant until the last day of the applicable period to act as being suggestive of a lack of diligence on the part of the movant. *SLW Licensing*, 60 USPQ2d at 1373-75; *Luemme*, 53 USPQ2d at 1760-61.

In the present case, Registrant was given forty (40) days to file its Answer, but delayed until the final day of the response period before contacting Petitioner regarding an extension of time or filing Registrant's Motion. These actions show a lack of diligence or unnecessary delay on the part of Registrant in answering Petitioner's Petition for Cancellation. Further, no facts are provided in Registrant's motion for demonstrating that the Registrant acted diligently during the response period.

Again, Registrant's Motion merely asserts that changes in marketing and distribution initiatives may affect Registrant's responses in its Answer. Registrant does not provide any particular facts pertaining to what these marketing and distribution initiative changes may be,

when they were decided upon or will take effect, or what measures have been taken during the response period for resolving how any changes made may affect Registrant's responses. Further, Registrant's Motion does not explain why Registrant could not have completed its changes in marketing and distribution initiatives sooner.

The facts asserted in Registrant's Motion, therefore, are insufficient for meeting the burden of showing that Registrant was diligent in meeting its responsibilities and should be awarded additional time. For at least this reason Registrant's Motion should be denied.

iii. Registrant's Motion fails to provide a legally sufficient reason necessitating an extension of time.

As provided by 37 CFR § 2.113(a), in part, the Board's notification of the filing of an opposition or petition to cancel "shall designate a time... within which an answer must be filed." TBMP § 310.03(a). In certain instances, a request for an extension of time for filing an answer may be provided if particular facts are provided which show "good cause for the requested extension." TBMP § 509.01(a).

As discussed above, the Registrant's Motion requests an extension of time to answer Petitioner's Petition for Cancellation based on "changes in [Defendant's] marketing and distribution initiatives for goods bearing the above-identified registration *that may affect* [Defendant's] responses in its Answer to Petition to Cancel." (Emphasis added.) In addition to the reasons presented above, Registrant's Motion does not demonstrate good cause for an extension because the cited "changes" do not affect Registrant's obligation to file its Answer by the deadline.

Registrant cites no authority for the proposition its own activities affecting its responses justifies a delay in filing the Answer. TBMP § 507.02 sets out the rules for amending pleadings.

There is no reason Registrant could not have filed its Answer by the deadline and, if its responses were in fact subsequently affected, sought to file an amended Answer under TBMP § 507.02.

Furthermore, the allegations to which Registrant must respond relate to events that have already occurred. Petitioner's allegations relate to intended and actual uses of the MAXX SPINNER mark by Registrant as of: the application filing date (Petition ¶¶ 11, 181, and 184); the date of amendment of the application to designate 1(b) intent-to-use basis (Petition ¶¶ 9, 10, 13-17, and 186-188); the filing of the Statement of Use in support of the application (Petition ¶¶ 12, 18-175, 190, and 192-194); and the date of registration of U.S. Trademark Registration No. 4,860,604 (Petition ¶¶ 176, 178-180, and 182).

It is unclear how current, perhaps ongoing, changes in Registrant's marketing and distribution initiatives could have any effect on Registrant's intended and actual uses of the MAXX SPINNER mark in the past. Registrant's Motion sheds no light on this question and fails to address why Registrant cannot offer complete responses regardless of how it may be presently changing its marketing and distribution initiatives. Furthermore, Registrant's statement "changes... that may affect... [Defendant's] responses in its Answer" is equivocal. Even if Registrant's statement is true, the cited changes in marketing and distribution initiatives may also have no effect on Registrant's responses. In that case, Registrant's delay in filing an Answer would be solely the product of unnecessary delay and lack of diligence by Registrant. The applicable rules do not contemplate a grant of an extension of time based upon the assertion that some presently occurring event could possibly affect a party's responses.

II. DEFAULT JUDGMENT SHOULD BE ENTERED AGAINST REGISTRANT FOR FAILURE TO ANSWER

Petitioner requests that default judgment be entered in this matter pursuant to 37 CFR § 2.114(a) and that Registrant's U.S. Trademark Registration No. 4,860,604 be

cancelled. Petitioner respectfully submits that default judgment is warranted in light of Registrant's inaction during this cancellation proceeding as well as Registrant's disregard for the applicable rules during this cancellation proceeding.

Petitioner filed its Petition for Cancellation with the Patent and Trademark Office on December 15, 2015, stating several grounds for cancellation of the Registrant's U.S. Trademark Registration No. 4,860,604. The Board issued a Notice, dated December 27, 2015, which set the time to answer by February 5, 2016. Registrant failed to file its Answer by the deadline. Further, as of the filing of this paper, Registrant has still not filed its Answer.

Although Registrant has filed a Motion for Extension of Time to Answer, Petitioner respectfully asserts that the motion is both procedurally and substantively deficient, as discussed in Section I of this paper, and should be denied. Petitioner notes the lack of information provided in Registrant's Motion, the questionable basis offered to justify an extension, and that the Registrant's Motion was not filed until the last day within the period of time provided for Registrant to file its Answer. These facts indicate unjustified delay by the Registrant in completing its Answer. In addition, Petitioner notes the ineffective service of Registrant's Motion, as discussed in Section I of this paper. Petitioner respectfully asserts that Registrant's actions and inactions during this cancellation proceeding demonstrate a general disregard for the applicable rules governing this proceeding.

In view of Registrant's failure to file an answer by the answer deadline and the deficiencies in its Motion for Extension of Time to Answer, Petitioner respectfully submits

that entry of default judgment and cancellation of Registrant's U.S. Trademark Registration No. 4,860,604 are appropriate.

Dated: February 24, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury that **on February 24, 2016** a true copy of the foregoing **Response Brief and Motion** was served **via first class mail** on **Richard M. Blank** at 75 S Broadway 4th Floor, White Plains, NY 10601, attorney of record for Registrant.



Gregory W. Carr
Attorney for Petitioner